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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

ABRAHAM SRULOWITZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EDITOR'S NOTE:

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QUESTIONS PRESENTED FOR REVIEW

1a. Whether the decision to seal an indictment beyond the statute of limitations period is a prosecutorial decision or one to be made by a detached magistrate.

1b. Whether an indictment is properly sealed under Fed. R. Crim. 6(e)(4) where the magistrate who ordered the sealing was not provided any information by the prosecutor, did not exercise any discretion and merely rubber-stamped the prosecutor's request that the indictment be sealed.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Rules of Criminal Procedure, Rule 6(e)(4):

> **Sealed Indictments.** The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is set forth in the appendix at A-1. The opinion of the United States District Court is set forth in the appendix at A-12.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Second Circuit was entered on May 15, 1987. (A.1) The order denying a petition for rehearing and suggestion for rehearing en banc was entered on July 2, 1987. (A.10)

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. The Indictment And Trial

On May 11, 1983, a federal grand jury return d a two-count indictment against petitioner Abraham Srulowitz. The indictment involved incidents of alleged arson and mail fraud which occurred over five years earlier when Srulowitz, now age 35, was 19 years of age. At the request of the prosecutor, who offered no reason why sealing was thought desirable or necessary, the indictment was sealed by the magistrate. It was unsealed two months later on July 12, 1983.

The indictment charged Srulowitz with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO") based on several acts of mail fraud, and one substantive count of mail fraud. The RICO count alleged four predicate acts of mail fraud. Of the four, only two were alleged to have occurred within

the five year limitations period prior to May 11, 1983, the date the indictment was returned, assuming that the statute of limitations stopped running as of that date. One was based on a letter dated June 6, 1978; the other on a letter dated September 23, 1978. The letter dated September 23, 1978 was also the basis for the mail fraud count.

Srulowitz was convicted on both counts after a jury trial.

B. The First Appeal

On appeal, the Court of Appeals for the Second Circuit reversed the conviction. United States v. Srulowitz, 785 F.2d 382 (2d Cir. 1986). The substantive mail fraud was dismissed for insufficiency of the evidence; the government had failed to prove that the letter dated September 23 was mailed. The court also vacated the RICO conviction, ruling that the government had failed to meet its

obligations under Brady v. Maryland, 373 U.S. 83 (1963), to produce exculpatory evidence and remanding to the district court for further proceedings.

As a result of its holding, the court recognized that there was a statute of limitations problem. Given the failure of proof concerning the September 23, 1978 mailing, the mail fraud based on that letter could not serve as a predicate act for the RICO count. The only other mailing which might be timely was the June 6, 1978 letter. Although the indictment was voted before the five year limitations period had expired (May 11, 1983), the indictment was not unsealed until more than five years after that mailing (July 12, 1983). Accordingly, the Court of Appeals ruled that on remand Srulowitz could

"pursue a statute of limitations defense related to the propriety of the sealing of the indictment." 785 F.2d at 391.

In remanding, the Court of Appeals directed that:

> the question for decision on remand is what date should be considered the date the indictment was 'found' within the meaning of §3282.[1] If that date is the date on which the indictment was returned, the RICO count as pleaded is not barred by the statute of limitations because the alleged mailing of the June 6, 1978 letter occurred less than five years before the May 11, 1983 return. If, however, the date on which the indictment is 'found' is considered to be the date on which the indictment was unsealed, i.e., July 12, 1983, the RICO count must be

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[1] 18 U.S.C. §3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

> dismissed because the alleged June 6, 1978 mailing occured more than five years prior to that date.

Id. at 390-91.

C. On Remand

Following the appeal, petitioner moved in the district court for dismissal of the indictment, and an evidentiary hearing was held. At the hearing, the former Assistant United States Attorney who had been in charge of the case testified for the government about how the Srulowitz indictment came to be sealed and why he had wanted it sealed. The former prosecutor stated that, as a general rule, he never offered a magistrate any reasons when he wanted an indictment sealed and the sealing of the Srulowitz indictment followed this pattern. No reasons for the sealing were offered to the magistrate, no papers were submitted, and no transcript of the proceeding was made.

The former prosecutor also testified that he wanted the Srulowitz indictment sealed because the government was attempting to locate a third party who was a defendant named in a different, but related, indictment which had been returned, and sealed, several weeks before Srulowitz was indicted.[2] In addition,

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[2]Despite the purported justification, the government never explained how the disclosure of the Srulowitz indictment would trigger knowledge on the part of the third party, one Kenneth Aska, that there was an indictment against him. In any event, Aska was known to be seeking an opportunity to do federal, rather than state prison time, and thus was more likely to arrange a deal with the government if the charges were known.

Significantly, at a prior hearing, the same government lawyer claimed that the sealing had been warranted because another person, James Blackwell, was a fugitive from a state sentence. It had been shown, however, that during the relevant period Mr. Blackwell had been present in the former prosecutor's office and prepared to surrender himself. The former prosecutor, perhaps for obvious reasons, abandoned the the Blackwell rationale at the subsequent hearing.

according to the witness, the government also wanted the indictment sealed because it did not know where Srulowitz was.

The defense at the hearing sought to demonstrate that the sealing was not valid because it occurred without any exercise of discretion by the magistrate. In addition, the defense also sought to establish that the former AUSA had repeatedly changed the purported justification for the sealing and that he was not worthy of belief.[3] Moreover,

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[3]For example, at a prior hearing, the government claimed that the sealing was sought because of concern that Srulowitz would flee to Israel upon learning of the charges. This rationale was later abandoned and in any event was absurd: only months after the sealing, when the government did notify Srulowitz about the indictment, they did so with a telephone call and asked him to come in the following week with his lawyer, thus giving him ample time to flee notwithstanding their purported concern. Moreover, when Srulowitz appeared for arraignment, he was released on his own recognizance with the consent of the government and was granted permission, without objection by the government, to travel in Europe shortly thereafter.

(footnote continued)

even if he were, his testimony did not establish a valid prosecutorial purpose for the sealing. It was Srulowitz's contention that the indictment had been sealed, and unsealed similtaneously with several others, to permit the U.S. Attorney's office to reap the maximum publicity and public relations value from the indictments.

D. The District Court's Decision And The Second Appeal

Following the evidentiary hearing, the district judge ordered the indictment dismissed. The judge ruled, noting Fed. R. Crim. P. 6(e)(4)'s language and legislative

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(footnote continued from previous page)

In addition, at the hearing at issue in this case, the prosecutor claimed that the sealing had been warranted because the government could not locate Srulowitz. This, too, was shown to be bogus. The prosecutor had been informed of the town where Srulowitz lived and the record established that Srulowitz did in fact live there and was listed in the local telephone directory at his correct residence.

history, that Rule 6(e)(4) places the decision to seal an indictment in the hands of the magistrate and not, as the government had vigorously urged, in the hands of the prosecutor. In addition, he ruled that in order for the magistrate's decision to seal an indictment to be subject to review and to be entitled to appropriate deference the magistrate must be told the reasons why the prosecutor is seeking sealing. Finally, the court ruled that meaningful review of the magistrate's decision is possible only if a contemporaneous record of the prosecutor's reasons for wanting the indictment sealed is made, a procedure which had not been followed. In light of his legal conclusions, the district judge found it unnecessary to resolve questions relating to the credibility of the witnesses and the propriety of the sealing.

Because the procedure used for the sealing was found to be improper, the district court concluded that the indictment was not "found" until it was unsealed on July 12, 1983, and that the prosecution was therefore time-barred.

On May 15, 1987, the Second Circuit reversed. Focusing on the third, and least important, aspect of the district court's decision, the panel held that no contemporaneous record of the request to seal need be made. As to the two other questions raised in the case -- i.e., whether the decision to seal is one for the magistrate or one for the prosecutor, and whether the prosecutor must offer the magistrate reasons as to why sealing is sought -- the court's decision was ambiguous. It paid lip service to the view that the discretion was solely that of the magistrate, but it reinstated the

indictment even though the magistrate here clearly did not exercise any discretion whatsoever. The panel remanded the case to the district court for review of the reasons for sealing advanced by the prosecution.

Petitioner filed a petition for rehearing and suggestion for rehearing en banc, which was denied on July 2, 1987. On July 9, 1987, the Second Circuit granted petitioner's motion to stay the mandate pending the filing of this petition on or before July 30, 1987.

REASONS FOR GRANTING THE WRIT

THE DECISION TO SEAL AN INDICTMENT BEYOND THE STATUTE OF LIMITATIONS PERIOD MUST BE MADE BY A DETACHED MAGISTRATE, NOT A PROSECUTOR. WHERE A MAGISTRATE RECEIVES NO INFORMATION TO JUSTIFY THE SEALING AND MERELY RUBBER STAMPS THE PROSECUTOR'S REQUEST, THE MAGISTRATE HAS NOT EXERCISED DISCRETION AS REQUIRED BY FED. R. CRIM. P. 6(e)(4)

In reversing the decision of the district court, the Second Circuit has approved a procedure whereby a magistrate can direct the sealing of an indictment beyond the statute of limitations period even though he has not been informed of any of the purported bases for the sealing, exercises no discretion whatsoever and serves merely as a rubber stamp for the prosecutor's request. This procedure cannot be squared with the clear mandate of Fed. R. Crim. P. 6(e)(4). Because the Court of Appeals has permitted the prosecutor to

exercise authority which Congress has conferred upon the magistrate, its decision promotes disrespect for the dignity of the judicial office, adversely affects important rights of the defendant and raises substantial public policy concerns.

Rule 6(e)(4) of the Federal Rules of Criminal Procedure, which deals with the sealing of indictments, must be considered in the context of its legislative history. As initially drafted, the rule allowed the government attorney to direct the sealing of an indictment. But this was changed in order to provide that a magistrate, not the prosecutor, exercise the discretion to order the sealing. During the drafting process, the legislators expressed concerns about giving prosecutors the right to seal an indictment and the effect that would have on the constitutional rights of defendants. See

Comments, Recommendations and Suggestions Received Concerning the Proposed Federal Rules of Criminal Procedure, Vol. II, at 354 (1943).[4] In order to protect defendants' Sixth Amendment right to a speedy trial, the Rule as ultimately enacted required that sealing be in the hands of a judicial officer who would have the discretionary authority and the full responsibility to evaluate the relevant facts.

The language that was ultimately adopted as Rule 6(e)(4) provides that:

> [t]he federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial.

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[4] See also Tentative Draft 6, Comments to Rule 6, Advisory Committe on the Federal Rules of Criminal Procedure (Youngquist) (Fall 1942); Comments, Recommendations and Suggestions Received Concerning the Proposed Federal Rules of Criminal Procedure, Vol. I, pp. 60, 61 (Hon. C.C. Wyche, United States District Judge, and W.S. Stewart, Esq.); Vol. II at 354 (S.H. Steinbrink, Esq.) (1943).

As can be seen, the language of the rule clearly reflects the Congressional mandate: it is the "magistrate," not the prosecutor, who "may direct" the sealing.

The import of Rule 6(e)(4) has been recognized by the circuit courts of appeal. See United States v. Southland Corp., 760 F.2d 1366, 1380 (2d Cir.), cert. denied, 106 S.Ct. 82 (1985) ("[t]he limiting effect of Rule [6(e)(4)] was to place sealing in the hands of a judicial officer rather than as theretofore in those of a prosecutor"). Accord, United States v. Ramey, 791 F.2d 317 (4th Cir. 1986) (the judicial officer's decision to seal the indictment upon motion by the prosecutor is based on the exercise of discretion which will be accorded great deference on appeal); United States v. Edwards, 777 F.2d 644 (11th Cir. 1985) ("great deference" accorded to discretion of the magistrate).

This notwithstanding, it has been the government's position that "the decision to seal is one for the prosecutor" and that, if the prosecutor wishes, the magistrate must direct that the indictment be sealed even though it extends beyond the limitations period. Such a construction, which was rejected outright by the district court but implicitly adopted by the Court of Appeals, is plainly unjustified. It turns the magistrate -- defined by Rule 54(e) to include not only the United States magistrates, but also judges of the United States -- into a mere puppet whose strings are pulled by the prosecutor. It also completely nullifies Rule 6(e)(4)'s discretionary "may," for if, as in this case, the discretionary determination whether or not to seal an indictment beyond the statute of limitations is one solely for the prosecutor,

then there is no room for the magistrate to determine whether or not the sealing would be proper.

Although the Court of Appeals seemingly acknowledged that discretion is to be exercised by the magistrate, by reversing, the Court has apparently found it acceptable for the magistrate to exercise this "discretion" in a vacuum, totally ignorant of the pertinent facts or the purported basis for the prosecutor's request. The Court of Appeals has thus adopted the government's position which, petitioner submits, is contrary to the letter and spirit of the Rule.

As Rule 6 and its history suggest, it is essential that the decision to seal an indictment beyond the statute of limitations be vested in a detached magistrate, for the decision affects important defense and public policy interests. For example, statutes of

limitation are designed, at least in part, to insure that after a specified period of time, an individual may rest secure that his exposure to criminal charges is at an end. Sealing, of course, can defeat this purpose since no real peace of mind is possible where, unbeknownst to a defendant, an indictment may exist "lurking in undisclosed government files." See United States v. Sherwood, 38 F.R.D. 14, 20 (D. Conn. 1964). Sealing also operates to interfere with the defendant's statutory right to a speedy trial after indictment. Under 18 U.S.C. §3161(e)(1), the 70-day period during which the trial of a defendant must commence runs from the "making public" of the indictment, not its return.

Since, by definition, the defendant is not represented when the sealing of an indictment is sought, the sealing proceeding is necessarily an ex parte one. Consequently,

the responsibility of the judicial officer to exercise his or her discretion to protect against unilateral action by the prosecutor which will adversely affect the defendant's rights with no countervailing justification is great.

Under the Court of Appeals holding, however, the power to manipulate the running of the clock -- both the "pre-indictment" statute of limitations clock and the post-indictment "speedy trial" clock -- have been given to the prosecutor, a party whose interests diverge dramatically from the defendant's. Because the interests are competing ones, it is most unfair to vest the power to perform the necessary balancing in one of the interested parties. This can ultimately lead to abuse, such as in this case where the record supports the conclusion that

the indictment was sealed in order for the prosecutor to capitalize on its publicity value.

Moreover, given the Congressional concerns relating to sealing and the clear mandate of Rule 6 that a judicial officer play a role in the sealing process, it is obvious that the magistrate's role was intended to be a meaningful one and not that of a mere functionary. The decision of the Court of Appeals is thus not only improper and unfair, but it breeds disrespect for the dignity of the role of the judicial office. An apt analogy would be that of a search pursuant to a warrant. It would surely be inappropriate for a court to require that a warrant issue by a magistrate, but to uphold a warrant which the prosecutor had requested even though he had not told any pertinent fact to the magistrate. In such a case -- and this is

exactly what happened here -- the judicial officer is relegated to a mere perfunctory role and it is the prosecutor who wields the actual power. This is exactly the opposite of Congress' expressed intention, and common sense and respect for the dignity of the judicial office mandate that the court be given a role beyond that of acting as a rubber stamp for decisions of the prosecutor.

The Court of Appeals was also incorrect in its more narrow holding that Rule 6(e)(4) does not require a contemporaneous record of the ex parte proceeding. Since, under Rule 6(e)(4), the decision to seal is not a unilateral decision of the prosecutor, but is one for the magistrate in the exercise his or her sound discretion, then it is incumbent on the prosecutor to present reasons for the sealing, and these reasons should be in some form preserved. As found by the district

court, such preservation would require no more than that either some letter, motion, or other written application be prepared by the government setting forth its reasons for wanting the indictment sealed or that an oral application to the magistrate be recorded on tape or by a stenographer. The purpose is to assure that at least some record be made to make possible or to facilitate review and to allow a reviewing court legitimately to grant deference to the magistrate's decision. Plainly, if such a record had been made here, the troublesome factual questions involved in this case -- where the government has changed the theory upon which it initially relied to justify the sealing and where a hearing is necessary to reconstruct the events -- would not have arisen.

In short, the decision of the Court of Appeals cannot be squared with the requirements of Rule 6(e)(4). The rule is premised upon a magistr te making a thougthful decision as to whether the reasons advanced by the prosecutor justity sealing. This is especially so where the sealing maintains secrecy beyond the statute of limitations period. The Court of Appeal's holding -- premised on the fact that the magistrate is merely a rubber stamp for the prosecutor's decision -- encourages the magistrate not to ask pertinent questions and to abdicate the power conferred upon him by Rule 6(e)(4). It places the real power to seal an indictment in the hands of the prosecutor. Because this is contrary to the Federal Rules and a recurring issue, petitioner respectfully requests that the writ of certiorari be granted.

CONCLUSION

For the above-stated reasons, the writ of certiorari requested herein should be granted.

Respectfully submitted,

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July 29, 1987

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 775—August Term, 1986

(Argued: February 10, 1987 Decided: May 15, 1987)

Docket No. 86-1446

UNITED STATES OF AMERICA,

Appellant,

— against —

ABRAHAM SRULOWITZ,

Defendant-Appellee.

Before:

LUMBARD, KEARSE and MINER,

Circuit Judges.

Appeal from order entered in the United States District Court for the Eastern District of New York (Glasser, J.)

dismissing, on statute of limitations grounds, indictment charging appellant with violation of the Racketeer Influenced and Corrupt Organizations Act. The district court held that the indictment was not found until it was unsealed because no contemporaneous record was made of the government's application to the Magistrate for sealing.

Reversed and remanded.

PETER A. NORLING, Assistant United States Attorney, Brooklyn, NY (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Jane Simkin Smith, Special Assistant United States Attorney, Brooklyn, NY, of counsel) *for Appellant.*

NATHAN Z. DERSHOWITZ, New York, NY (Victoria B. Eiger, Dershowitz & Eiger, P.C., New York, NY, Alan M. Dershowitz, Cambridge, MA, of counsel) *for Defendant-Appellee.*

MINER, *Circuit Judge*:

The government appeals from an order entered in the United States District Court for the Eastern District of New York (Glasser, J.) dismissing an indictment charging defendant-appellant Abraham Srulowitz in one count with violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*

(1982 & Supp. III 1985). The district court held that the indictment was not found within the five-year limitations period fixed by 18 U.S.C. § 3282 (1982). The court determined that the indictment was found on the date it was unsealed rather than on the date it was filed. This determination was predicated solely upon the lack of a contemporaneous record of the government's application to the Magistrate for sealing. Finding no requirement for a contemporaneous record of proceedings relating to the sealing of an indictment, we reverse and remand to the district court to decide, in accordance with our prior remand, whether the sealing was informed by proper prosecutorial objectives.

BACKGROUND

The two-count indictment originally returned against Srulowitz charged him with the RICO violation in count one and mail fraud, in violation of 18 U.S.C. § 1341 (1982), in count two. The indictment was handed up on May 11, 1983 and was ordered sealed on the same day by Magistrate Scheindlin at the request of Assistant United States Attorney Max Sayah, now a Judge of the Criminal Court of the City of New York. No record was made of the proceedings before the Magistrate, and no papers in support of the application for sealing were submitted. According to the testimony of Judge Sayah at the hearing below, it was the normal practice of the United States Attorney's office not to give any explanation for such a request, and reasons for the sealing "probably" were not presented to the Magistrate in this case.

On July 12, 1983, the indictment was unsealed and Srulowitz was arraigned. In the RICO charge alleged in count one of the indictment, Srulowitz was accused of participating in an arson-for-profit scheme involving the burning

of four sets of properties in order to collect the proceeds of fire insurance. In the mail fraud charge alleged in count two of the indictment, Srulowitz was accused of causing a letter to be mailed on September 23, 1978 in furtherance of the arson scheme. Following a jury trial, Srulowitz was convicted on both counts and sentenced to six years' imprisonment on count one and five years' probation on count two.

On appeal, a panel of this Court reversed the conviction on count two, finding that there was no proof of mailing of a letter on September 23, 1978, and remanded for a new trial on count one because the government had withheld exculpatory material. *United States v. Srulowitz*, 785 F.2d 382 (2d Cir. 1986). With the elimination of the September 23, 1978 mailing as a predicate for racketeering activity, the panel also recognized the viability of a statute of limitations defense on remand, since a letter allegedly mailed on June 6, 1978 in connection with the scheme was the last timely predicate act:

> The question for decision on remand is what date should be considered the date the indictment was "found" within the meaning of § 3282. If that date is the date on which the indictment was returned, the RICO count as pleaded is not barred by the statute of limitations because the alleged mailing of the June 6, 1978 letter occurred less than five years before the May 11, 1983 return. If, however, the date on which the indictment is "found" is considered to be the date on which the indictment was unsealed, *i.e.*, July 12, 1983, the RICO count must be dismissed because the alleged June 6, 1978 mailing occurred more than five years prior to that date.

Id. at 390-91. The panel noted that, where sound discretion dictates the sealing of an indictment, the date of

return, rather than the date of unsealing, is controlling for statute of limitations purposes. It concluded that "[s]uch an exercise of discretion may be warranted for a number of proper prosecutorial purposes or where the public interest otherwise requires the sealing." *Id.* at 391.

On remand, the district court conducted a hearing to determine whether there was a sound basis to seal the indictment. The government argued that it was constrained to conceal the fact that Srulowitz was indicted while it attempted to locate him and to secure the cooperation of a crucial witness. In support of its argument, the government adduced testimony from Judge Sayah and Special Agent Frank Napoli of the Treasury Department. Srulowitz called, as his witnesses at the hearing, Joseph Bald, who previously had been convicted for his part in the arson scheme, and Jay Hodes, a fire insurance adjuster retained to negotiate the adjustment of insurance claims generated by the scheme. Srulowitz argued that the reasons advanced by the government for the sealing were pretextual in nature and that the Magistrate had no basis whatsoever for ordering that the indictment be sealed.

Rather than evaluating the testimony presented at the hearing to determine the adequacy of the reasons for sealing given by the government, the district court held that "the failure of the government to make a record of its application to the Magistrate mandates a holding that the indictment was not found until it was unsealed on July 12, 1983." Memorandum and Order dated September 20th, 1986. Accordingly, the court dismissed the remaining count of the indictment, because "no predicate act in the RICO count took place during the limitations period." *Id.* We reverse and remand to the district court with instructions to comply with the directions included in our prior remand.

DISCUSSION

The statute of limitations applicable to the prosecution at bar provides as follows:

> [N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3282. For the purpose of tolling the statute of limitations, an indictment is "found" when it is returned by the grand jury and filed. *United States v. Villa*, 470 F. Supp. 315 (N.D.N.Y. 1979); *see United States v. Cerelli*, 428 F. Supp. 801, 808 (W.D. Pa.), *aff'd*, 558 F.2d 697 (3d Cir.), *cert. denied*, 434 U.S. 966 (1977); Fed. R. Crim. P. 6(f). Accordingly, when a sealed indictment is not opened until after the expiration of the time allowed by the statute of limitations for the prosecution of an offense, the statute ordinarily is not a bar to prosecution if the indictment was timely filed. *United States v. Muse*, 633 F.2d 1041 (2d Cir. 1980) (en banc), *cert. denied*, 450 U.S. 984 (1981). However, when the defendant can demonstrate substantial actual prejudice occurring between the date of sealing and the date of unsealing, the expiration of the limitations period before the latter event warrants dismissal of the indictment. *Id.* at 1042. In such a case the indictment is not considered "found" until it is unsealed.

The authority of the court to maintain the secrecy of an indictment is conferred by Rule 6(e)(4) of the Federal Rules of Criminal Procedure:

> The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released

pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

Where the prosecution can demonstrate that the decision to keep an indictment secret is informed by the exercise of sound discretion in the public interest, the date of return, rather than the date of unsealing, will establish the time the indictment is "found." *United States v. Southland Corp.*, 760 F.2d 1366, 1379-80 (2d Cir.), *cert. denied*, 106 S. Ct. 82 (1985); *see Srulowitz*, 785 F.2d at 391. We have held that there are various legitimate prosecutorial objectives, including, but not limited to, the facilitation of arrest, that will justify the sealing of an indictment. *Id.*

Here, the defendant was unable to demonstrate any prejudice arising from the sealing of his indictment and occurring during the period between sealing and unsealing. He was content merely to challenge the government's assertion that secrecy was necessary while it sought to ascertain his whereabouts and to secure the cooperation of an important witness in his case. Although the government's witnesses testified that Srulowitz's location was unknown, there is evidence in the record that he was at all pertinent times living in Monsey, New York, and easily could have been found there. As to the government's evidence that the public filing of an indictment against Srulowitz would have foiled its attempts to secure the surrender of Kenneth Aska, a fugitive, defendant asserts that the government failed to demonstrate how this would be so.

The district court did not determine whether the government had proved that the decision to seal was impelled by proper prosecutorial purposes. Instead, the court de-

clined to review the evidence presented at the hearing because "a reviewing court [must] have before it a contemporaneous account of the basis for the magistrate's decision, and not merely a *post hoc* rationalization." App. at 181. In the absence of "a contemporaneous account," the district court concluded that the indictment was not "found" until it was unsealed after the expiration of the limitations period.

No statute, rule or precedent establishes specific procedures to be followed by the Magistrate prior to the sealing of an indictment. Certainly, there is no requirement that a record be made of the proceedings culminating in the direction to seal. The fact that Rule 6(e)(4) "place[s] sealing in the hands of a judicial officer rather than ... in those of a prosecutor," *Southland*, 760 F.2d at 1380, lends no support to the argument that a contemporaneous record must be made, since sealing in the first instance is but a ministerial act, and it is wholly within the discretion of the Magistrate whether to require the prosecutor to justify a request to seal. A defendant's right to challenge the propriety of the sealing is fully protected by affording him the right to a hearing *after* the indictment is opened to public inspection. At that time, the government, if challenged, must demonstrate legitimate prosecutorial purposes for the secrecy of the indictment, and the defendant is entitled to show "substantial, irreparable, actual prejudice" arising from the decision to seal. *United States v. Edwards*, 777 F.2d 644, 649 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986).

The parties generally involved in sealing an indictment —the Magistrate and the United States Attorney— recognize the dangers of a prematurely disclosed indictment and operate with them in mind. The Magistrate here

obviously so acted and needed no detailed statement of the reasons why the United States wished to have the indictment sealed. Nor was a contemporaneous record otherwise required. Indeed, it is difficult to imagine any circumstances where any purpose would be served by keeping and making a record. On the contrary, the very making and keeping of any record might simply increase the chances of premature disclosure. Consequently, we see no need for the United States Attorney to do more in the first instance than to make a request that the indictment be sealed. A simple request for secrecy by the prosecutor, whether recorded or unrecorded, is sufficient to invoke the Magistrate's authority to direct sealing. Of course, "great deference" is to be accorded to the discretion of the Magistrate in the exercise of that authority. *Id.* at 648; *Southland*, 760 F.2d at 1380. Here, the district court declined to review the reasons for sealing advanced by the prosecution on the erroneous assumption that a contemporaneous record of the application was required.

CONCLUSION

The order of dismissal entered by the district court is reversed. On remand, the district court is to determine, in accordance with the foregoing, the date on which the indictment was found. If it is determined that the indictment was found at the time of filing, retrial should proceed in accordance with our prior remand. If it is determined that the indictment was found when it was unsealed, the indictment should be dismissed. Jurisdiction is retained for the limited purpose of allowing the parties the opportunity to appeal from the district court's determination regarding the date on which the indictment was found.

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UNITED STATES
COURT OF APPEALS
FILED JULY 2 1987
ELAINE B. GOLDSMITH,
CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of July one thousand nine hundred and eighty-seven.

UNITED STATES OF AMERICA, NO. 86-1446
Appellant,

-against-

ABRAHAM SRULOWITZ,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellee Abraham Srulowitz,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ABRAHAM SRULOWITZ,

Defendant.

MEMORANDUM AND ORDER
CR-83-217

GLASSER, United States District Judge:

I. BACKGROUND

Defendant Abraham Srulowitz was convicted by a jury in this district on both counts of an indictment. Count one charged a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 et seq., while count two charged mail fraud, id. § 1341. The court of appeals reversed the conviction on the mail fraud count and dismissed that count for insuffiency of evidence. Additionally, it vacated the RICO

conviction and remanded to this court for further proceedings on that count. United States v. Srulowitz, 785 F.2d 382 (2d Cir. 1986).

The court of appeals held that Srulowitz was entitled, on remand, "to pursue a statute of limitations defense related to the propriety of the sealing of the indictment." Id. at 391. This he now does. The statute of limitations argument arises from a somewhat atypical fact pattern, much of which is summarized in the opinion of the court of appeals, id. at 390-91.

The grand jury indicted Srulowitz on May 11, 1983. The RICO count alleged four predicate acts, see 18 U.S.C. § 1961(5), each of which involved allegedly fraudulent mailings. Of the four predicate acts, only two involved mailings alleged to have taken place after May 11, 1978 and thus within the

five-year limitations period fixed by 18 U.S.C. § 3282. The court of appeals held that the government failed at trial to offer evidence that a letter of September 23, 1978, which also provided the basis for the mail fraud count, was ever mailed. See Srulowitz, supra, 785 F.2d at 387 ("no rational juror could have concluded beyond a reasonable doubt that the [letter of September 23] had been mailed"). Accordingly, the only remaining allegation of a mailing within the limitations period concerns a letter of June 6, 1978.

Ostensibly, a June 6, 1978 letter, coming as it does after the crucial date of May 11, 1978, would be within the limitations period, if only barely. But, at the government's request, the Srulowitz indictment was sealed by a magistrate and was not unsealed until July 12, 1983. In this connection, the general rule on the federal statute of limitations is:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3282 (emphasis added).

The issue before the court is whether the indictment of Srulowitz was "found" on May 11, 1983, when voted by the grand jury, or on July 12, 1983, when unsealed. If the indictment was not found until it was unsealed, there remains no predicate act within the five-year limitations period, because the June 6, 1978 letter proceded the July 12, 1983 unsealing of the indictment by more than five years. Under that circumstance, the court would be constrained to dismiss the RICO count, which is all that remains of the indictment. See Srulowitz, supra, 785 F.2d at 390-91.[1]

II. CONTENTIONS OF THE PARTIES

The court thus turns to the question of when the indictment was found. Citing United States v. Southland Corp., 760 F.2d 1366, 1379-80 (2d Cir.) cert. denied, 106 S. Ct. 82 (1985), the court of appeals noted that it had

> ruled that the date on which an idictment is "found" within the meaning of § 3282 is the date on which it is returned, rather than the later date of unsealing, when the excercise of a sound discretion has called for the indictment's sealing.

Srulowitz, supra, 785 F.2d at 391.

The sealing of an indictment is governed by rule 6(e)(4) of the Federal Rules of Criminal Procedure, which provides:

> Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the

return of the indictment except when necessary for the issuance and execution of a warrant or summons.

In construing this rule, Srulowitz relies on the following sentence of Judge Friendly's opinion for the Second Circuit in Southland, supra: "The limiting effect of the Rule was to place sealing in the hands of a judicial officer rather than as theretofore in those of a prosecutor." Southland, supra, 760 F.2d at 1380. According to Srulowitz, rule 6(e)(4) has been violated in this case, because the determination to seal the indictment was made by an Assistant United States Attorney, whose decision was "rubber stamped" by a magistrate without the presentation of papers or arguments in support of sealing. Srulowitz contends that the magistrate exercised no discretion and therefore failed to make the determination implicitly required by rule 6(e)(4).

For its part, the government maintains that it successfully demonstrated at an evidentiary hearing held before this court that there were legitimate reasons to seal the indictment. Max Sayah, now a judge of the New York City Criminal Court, was the Assistant United States Attorney in charge of the Srulowitz matter at the time of the indictment. He testified on June 26, 1986, that the main reason he sought to have the indictment sealed was to facilitate the capture of Kenneth Aska, a fugitive alleged to have been involved in an arson-for-profit scheme with Srulowitz and others. A secondary reason advanced by Sayah was that sealing would help the government apprehend Srulowitz.[2]

Even if the goverment had legitimate reasons to seek sealing of the indictment, it still must answer Srulowitz's argument that the procedure followed before the magistrate

was improper. In particular, the government must address Southland's declaration that "[t]he limiting effect of the Rule was to place sealing in the hands of a judicial officer rather than as theretofore in those of a prosecutor," 760 F.2d at 1380. Toward this end, the government argues that Southland "did not specifically hold that any particular demonstration of need must be made to the magistrate before the indictment could be sealed." Memorandum of Law in Opposition to Motion to Dismiss, July 28, 1986, at 26. As to Southland's characterization of rule 6(e)(4) as placing sealing in the hands of a judicial officer rather than those of a prosecutor, the government offers a variety of responses: (1) the rule itself says no more than that the magistrate directs the sealing; (2) the sentence in question appeared in the context of Southland's discussion of the

reasons that would justify sealing, and the procedure for sealing was not at issue before the Second Circuit; and (3) Southland, in relying upon 1 Orfield, Criminal Procedure Under the Federal Rules § 6:1, at 341 (1966), cited an authority that described how rule 6(e)(4) as enacted differed from draft versions of the rule, but rule 6(e)(4) did not change contemporary practice, which had been for the court to direct sealing at the government's request.

Additionally, the government responds to Srulowitz's argument predicated on Southland's quotation of the statement made at a symposium that Rule 6 included

> the usual provision for the sealing of the indictment, where the district attorney or the attorney general is of the opinion that the indictment having been procured, for sound reasons of policy, nothing should be done for a while, no publication made of the fact. That, of course, is present practice.

Southland, supra, 760 F.2d at 1380 (quoting VI Proceedings of the New York University Law School Institute on the Federal Rules of Criminal Procedure 155 (1946) (remarks of George Medalie) (emphasis added in Southland). Srulowitz reads the quoted language as implying a duty on the part of the judicial officer to exercise her discretion and determine what the "sound reasons of policy" are. The government answers that both before and after the rule was enacted, the sound reasons of policy were determined by the prosecutor.

Finally, Srulowitz points to the following excerpt from Southland:

> The question remains whether the prosecutorial objectives here sought to be obtained justified the sealing of the indictment. This is a point on which great deference should be accorded to the discretion of the magistrate, at least in the absence of any evidence of substantial prejudice to the defendant.

Southland, supra, 760 F.2d at 1380.

Srulowitz understands the excerpt to mean that the magistrate must make a decision based upon an informed excercise of discretion. In other words, he contends that the magistrate may not serve as a rubber stamp for a prosecutorial ipse dixit. The government, on the other hand, notes that Southland did not decide who determines the validity of reasons for sealing an indictment but merely what reasons are valid.

The parties also disagree about the meaning of the legislative history to rule 6(e)(4). Srulowitz notes that a draft of the rule had provided that an "attorney for the government" could direct sealing of the indictment, that a later draft substituted "United States Attorney" in place of "attorney for the government," and that the rule as enacted stated "the court may direct" sealing.[3]

According to Srulowitz, this transition in the language of the rule bespeaks a legislative intent that sealing be the subject of careful judicial oversight. The government discerns instead a legislative feeling that it is more appropriate that a judicial officer, rather than government counsel, direct the actions of judicial personnel -- in this case, the clerk of the court.

III. HOLDING

The issue of how to read rule 6(e)(4) has been briefed capably, even ingeniously, by both sides. Following a careful reading of the parties' memoranda and the authorities cited therein, the court is satisfied that Srulowitz should prevail. Accordingly, the court holds that the indictment was not found until it was unsealed on July 12, 1983. The result of this holding is that no predicate

act took place during the limitations period, and the indictment must therefore be dismissed as barred by the statute of limitations.

The starting point for the court's conclusion is Southland. While it is true that the Second Circuit was not deciding what procedure was appropriate for sealing an indictment, but merely what type of rationale justified sealing, Judge Friendly's opinion evinces an unmistakable intent that sealing be the result of an active judicial determination and not a passive acceptance of governmental requests. If sealing is to be "in the hands of a judicial officer" and if that officer's exercise of discretion is entitled to "great deferense," the magistrate must be doing more than marching to the prosecutor's tune. It is logical to infer that the dratters of Rule 6(e)(4) would not got to the trouble of requiring a judicial determination without

making it equally mandatory that the determination be subject to review. Were the government permitted to obtain the magistrate's imprimatur on a request to seal without making any record of what the magistrate was told, there would be no reliable distinction between cases where sealing is permissible and those where it is impermissible. The case law that has developed regarding circumstances under which sealing is appropriate, see, e.g., United States v. Ramey, 791 F.2d 317 (4th Cir. 1986) (sealing appropriate to protect witnesses cooperating in lengthy criminal investigation from danger and undue influence); United States v. Edwards, 777 F.2d 644, 648-49 (11th Cir. 1985) (tolling statute of limitations on charges of conspiracy to import with intent to distribute thousands of pounds of marijuana arguably required by public interest and

supported by sound reasons of policy), cert. denied, 106 S. Ct. 1644, 106 S. Ct. 1645 (1986); Southland, supra, 760 F.2d at 1378-81 (sealing appropriate to help government obtain complete and truthful testimony from immunized witness); United States v. Michael, 180 F.2d 55, 56-57 (3d Cir. 1949) (court is permitted, in exercise of sound discretion, to impose secrecy for reasons other than obtaining custody of defendant), cert. denied, 339 U.S. 978 (1950), would be no more than a charade if meaningful review of the decision to seal were impossible -- as it is here, in the absence of a record of the proceedings before the magistrate.[4]

The court in no way impugns the integrity of magistrates when it holds that their decisions on sealing of indictments must be subject to review. It is the nature of our system that, on occasion, counsel will be

required to seek ex parte relief; generally, a motion to seal an indictment would be meaningless if made on notice. But it is especially important that the rare cases in which ex parte relief is necessary not become extraordinary cases in which review is impossible. With all respect to the professionalism and fairness of prosecutors and magistrates, if the rules about sealing of indictments cannot be enforced through appellate review, the grand principles announced by the courts would be no more than "pretend-rules," see United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting), cert. denied, 329 U.S. 7423 (1946); accord, e.g., United States v. Borello, 766 F.2d 46, 57-58 (2d Cir. 1985), because they would lack practical impact. Adherence to rules is protected by the adversary systm and by the availability of

review. In the absence of these guarantors, the rules would be precatory at best -- and illusory at worst.

The tenor of the cases that discuss sealing of indictments demonstrates that prosecutors have recognized the necessity of making a record when seeking this relief. Southland's admonition that the magistrate's discretion is entitled to "great deference," 760 F.2d at 1380, implies that the reviewing court will have before it a contemporaneous account of the basis for the magistrate's decision, and not merely a post hoc rationalization. In United States v. Ramey, 791 F.2d 317, 322 (4th Cir. 1986), the magistrate held an evidentiary hearing and "painstakingly marshalled" the evidence on which he based his findings. The reviewing court in Unites States v. Edwards, 777 F.2d 644, 648 (11th Cir. 1985), cert denied, 106 S.

Ct. 1644, 106 S. Ct. 1645 (1986), had the benefit of a record of the colloquy between government counsel and the magistrate.

Because the court finds that the decision to seal an indictment must be made by a magistrate, not by a prosecutor, and that the magistate's decision must be susceptible of meaningful, if deferential, review, the failure of the government to make a record of its application to the magistrate mandates a holding that the indictment was not found until it was unsealed on July 12, 1983. The consequence of that holding is that no predicate act in the RICO count took place during the limitations period. Accordingly, Srulowitz's motion to dismiss the indictment must be granted.[5]

SO ORDERED.

Dated: Brooklyn, New York
September 30, 1986

I. Leo Glasser
United States District Judge

FOOTNOTES

1 The court of appeals recognized that Srulowitz had no incentive to press a statute of limitations argument before decision of his appeal, because the September 23, 1978 letter wold have come within a limitations period commencing on July 12, 1978, five years before the indictment was unsealed. See Srulowitz, supra, 785 F.2d at 391. It was only after the court of appeals ruled the September 23 letter out of the case that Srulowitz gained an opportunity to press a statute of limitations defense, and the Second Circuit explicitly preserved his right to do so. See id.

2 Srulowitz vigorously contests the government's theory that sealing was a necessary or legitimate step toward his apprehension or Aska's. For reasons that will become appaarent, it is not necessary for the court to address this issue, or the issue of how many predicate acts must take place within the limitations period to support a RICO charge.

3 Of course, the current version of the rule refers to "the magistrate" rather than to "the court."

4 Judge Sayah, the former prosecutor, testified that he "probably" did not tell the magistrate why he sought to have the indictment sealed and that there was no transcription made of the proceeding.

5 The court views the violation of rule 6(e)(4) as sufficiently serious to compel rejection of the goverment's alternative suggestion that a ruling against its position

be applied only prospectively. Where a statute of limitations is concerned, harmless error analysis is inapposite. What is more, prospective application of the ruling would smack of the "pretend-rules" against which Judge Frank wisely counseled.